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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Informatics General Corporation

File: B-224182

Date: February 2, 1987

DIGEST

1. The awardee's prior problems in performing its incumbent contract were not grounds to downgrade its technical proposal for comparative evaluation purposes where the agency reasonably determined that the firm's ultimate resolution of these problems demonstrated its capability with regard to the current effort.
2. The fact that the successful offeror, with knowledge prior to award that a proposed key employee had accepted other employment, did not take steps to withdraw her qualifications statement and substitute a similarly qualified individual for the position provides no basis to sustain the protest where the evidence of record does not convincingly established that the misrepresentation was intentional.
3. Since an agency's cost realism evaluation necessarily involves the exercise of informed judgment as to what costs may be incurred by accepting a proposal to perform a cost-type contract, GAO will not disturb the results of that evaluation unless shown to be unreasonable.

DECISION

Informatics General Corporation (Informatics) protests the award of a contract to Library Systems and Services, Inc. (LSSI) under request for proposals (RFP) No. DE-RP01-86-MA21059, issued by the Department of Energy (DOE). The procurement is for the acquisition of services in support of the operation of DOE's technical library (Energy Library).

Informatics principally complains that DOE improperly determined LSSI to be the successful offeror as a result of the agency's failure to assess meaningfully certain factors directly relevant to the technical merit of LSSI's submitted proposal. In addition, Informatics asserts that LSSI made a material misrepresentation in its offer concerning the availability of a proposed key employee. Informatics also questions the results of the agency's cost realism evaluation.

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We deny the protest.

BACKGROUND

The RFP solicited offers to furnish support services for the operation of the Energy Library at its Forrestal and Germantown branch sites. The services being acquired include reference and research, cataloguing, public service functions, acquisitions and journal subscriptions, translation, and, significant to this case, data processing services. It is necessary that the contractor be experienced in data processing services because the Energy Library is extensively automated. The requisite data processing elements comprise the operation of an acquisitions reporting and control system, hardware and software analysis, systems evaluation, and machine-to-machine communications.

The RFP was issued on December 26, 1985, and contemplated the award of a level-of-effort, cost-plus-award-fee contract for a 36-month base period with a 12-month optional period of performance. Offerors were required to submit separate technical and cost proposals. The solicitation provided that the technical proposals were "of substantially greater importance" than the cost proposals. However, offerors were also advised that:

" . . . if, after evaluation of the Technical and Cost proposals, two or more competing overall proposals are within the competitive range, evaluated probable cost to the Government may be the deciding factor for selection, depending on whether the most acceptable overall proposal (excluding cost consideration) is determined to be worth the cost differential, if any."

The RFP set forth the various criteria under which the technical proposals would be evaluated. These factors were assigned a total value of 1000 points for evaluation purposes.

Although the RFP did not inform offerors of the precise point values of the various criteria, it did provide that the evaluation factors were listed in descending order of importance, with Criterion 1, Technical Understanding and Approach being approximately three times as important as Criterion 2, Project Structure, which was approximately twice as important as Criterion 3, Corporate Resources, and Criterion 4, Related Corporate Experience which were equal.

The extended closing date for receipt of initial proposals was February 7, 1986. The agency's proposal evaluation board evaluated the four proposals received and determined that only the proposals submitted by Informatics and LSSI were within the competitive range. Informatics was the incumbent contractor for the operation of the Energy Library, whereas LSSI was the incumbent contractor maintaining the MINI-MARC/OSTS library materials information systems, which are proprietary to LSSI. (MINI-MARC is a cataloguing resource system and OSTS is an on-line serials tracking system.)

Both firms received high technical scores for their initial proposals, with Informatics' proposal receiving a slightly higher score than LSSI's on the 1000-point scale. Although LSSI enjoyed a very small point advantage under Criterion 1, the most important, Informatics' proposal received a perfect score for Criterion 3 and Criterion 4, and a near-perfect score for Criterion 2. With regard to the initial cost proposals, Informatics' offered cost was somewhat lower than LSSI's.

On April 11, DOE requested that both firms respond to various questions generated by the initial evaluation as to perceived weaknesses in their proposals and to submit revised proposals by April 28. Upon reevaluation, DOE upgraded both firms' technical ratings. Both firms improved their scores -- for Criterion 1, but Informatics' score under that criterion now became marginally higher than LSSI's. In addition, Informatics' proposal now received a perfect score for Criterion 2, and its perfect scores for Criterion 3 and 4 remained unchanged. Overall, Informatics' scoring advantage over LSSI increased slightly. The evaluators then reported these scores to the source selection official for the procurement on May 7.

DOE determined that the responses from the firms in their revised proposals raised additional questions regarding proposed costs. Accordingly, the firms were asked to respond to a set of cost questions and to submit revised proposals by May 22. Discussions were then conducted with the firms in August, and the firms were requested to submit best and final offers (BAFOs) in the form of executed contracts by August 25.

The evaluation board chairman then presented the evaluators' findings to the selection official, advising that the technical scores reported on May 7 remained unchanged following review of the August 25 BAFOs. The consensus of the evaluators was that both Informatics and LSSI had submitted outstanding technical proposals, with no reported areas of remaining weakness.

The evaluation board chairman advised the source selection official that either firm "is fully capable of carrying out the library services function," and, accordingly, that "the determining factor for selection should be price only."

In this regard, the agency had conducted a cost realism analysis, and had upwardly adjusted both firms' BAFO costs to reflect the most probable cost to the government if either firm were awarded the contract. LSSI's evaluated probable cost was determined to be approximately \$200,000 lower than Informatics'.

The source selection official concurred with the evaluation board that both firms were essentially equal technically, and he concluded that LSSI should be awarded the contract as the lower probable cost offeror. The firm was awarded the contract on September 11 and Informatics then protested the award to this Office. Although the protest was filed within 10 calendar days of the award, DOE determined that contract performance should not be suspended pending our resolution of the protest because performance is in the government's best interest. See 31 U.S.C. §§ 3553(d)(1) and (d)(2)(A)(i) (Supp. III 1985); 4 C.F.R. § 21.4(b)(1) (1986).

PROTEST POSITION

Informatics asserts that the award to LSSI was improper on several grounds. The firm urges that DOE, in its evaluation, failed to assess meaningfully LSSI's past performance of its contract to maintain the MINI-MARC/OSTS systems. Informatics asserts that the firm's performance had been very deficient, as evidenced by the fact that LSSI was threatened with a termination for default unless it took immediate steps to rectify the problems DOE was encountering with the systems. Accordingly, Informatics contends that LSSI's proposal should have been significantly downgraded under those evaluation criteria directly relevant to its ability and experience to provide comprehensive library data processing services.

Informatics also alleges that LSSI made a material misrepresentation in its offer by continuing to propose as a key employee an individual that LSSI knew was no longer available to work for LSSI if it obtained the contract. Informatics contends that although this is a sufficient ground in itself to compel termination of LSSI's contract, the firm urges in the alternative that, in any event, the evaluation results were skewed to its disadvantage because LSSI's proposal was rated highly under the evaluation subcriteria relevant to proposed key personnel experience even though a designated

individual was no longer available to fill a critical position.

Informatics also contends that the agency's cost realism evaluation is subject to question principally because LSSI's evident technical weaknesses should have directly impacted upon the probable cost of accepting LSSI's proposal. In this regard, Informatics asserts that LSSI's lack of demonstrated capability in data processing services indicates that the firm will be required to increase the number of man-hours dedicated to the effort in order to perform the contract successfully. Informatics also urges that the indirect cost rates originally proposed by LSSI were improperly reduced as the result of the agency's cost realism evaluation.

ANALYSIS

Improper Technical Evaluation

It is not our function under our bid protest jurisdiction to conduct technical evaluations as to the merits of submitted proposals. Health Management Assoc. of America, Inc., B-220295, Jan. 10, 1986, 86-1 CPD ¶ 26. Although the burden clearly rests with the protester to show, beyond mere disagreement, that the agency's technical evaluation was unreasonable, Magnavox Advanced Products and Systems Co., B-215426, Feb. 6, 1985, 85-1 CPD ¶ 146; A.B. Dick Co., B-207194.2, Nov. 29, 1982, 82-2 CPD ¶ 478, we will review the record to determine whether the chosen method for evaluating proposals provides a rational basis for source selection and whether the actual evaluation has been conducted consistent with the criteria set forth in the solicitation. System Development Corp., B-219400, Sept. 30, 1985, 85-2 CPD ¶ 356.

It is well-settled that where selection officials reasonably consider competing proposals as essentially equal in terms of technical merit, cost may become the determinative factor in making award even though the evaluation criteria assigned cost less importance than technical considerations. Assoc. for the Education of the Deaf, Inc., B-220868, Mar. 5, 1986, 86-1 CPD ¶ 220. In the present matter, the selection official's conclusion that the slight scoring advantage in Informatics' favor did not represent any meaningful superiority in the merit of its technical proposal, and that cost, therefore, should be the determinative factor for selection purposes, was proper. See, e.g., Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71 (where we held that proposals with a 15 percent technical scoring differential between them reasonably were found to be essentially equal).

As noted above, Informatics contends that LSSI has been performing its maintenance services contract with DOE poorly and that, as a result, LSSI's proposal should have been downgraded significantly in the areas relevant to data processing capability. Specifically, agency documents submitted by Informatics indicate that in January 1986, the Energy Library's Director of Reference and Information Management, the same individual who served as the chairman of the proposal evaluation board for this procurement, reported to the contracting officer for LSSI's contract various recurring problems with the MINI-MARC and OSTS systems. The DOE contracting officer then followed-up with a letter of February 28, 1986, to LSSI, which stated that unless the problems were cured within 10 days, the contract might be terminated for default. Although DOE did not terminate LSSI's contract, Informatics argues that the record nonetheless demonstrates that LSSI's competence is doubtful, and, therefore, that the DOE evaluators had no reasonable basis to rate LSSI highly for its capability in data processing.

Our review of the record, however, does not lead us to the conclusion reached by Informatics. The record shows that the MINI-MARC and OSTS systems were developed by LSSI and were furnished by LSSI to DOE. On November 2, 1982, DOE awarded LSSI a maintenance services contract for these systems. Starting in late 1984, DOE amended LSSI's contract to provide for the reconfiguration of both MINI-MARC and OSTS from systems consisting of mini-computers run on floppy discs to systems utilizing micro-computers and laser discs. While the record shows that LSSI did encounter problems during 1985 and in early 1986 with the reconfiguration effort, it appears from the record that these problems were largely resolved by March 1986.

Thus, we find as reasonable DOE's assessment that LSSI's performance under its maintenance services contract did not reflect adversely on LSSI's capability to perform the contemplated operations contract. We have no reason to doubt DOE's statement that the problems encountered by LSSI under its prior contract were not unusual, given the reconfiguration task at hand. Secondly, it appears that LSSI successfully overcame the problems and completed the effort. Finally, as DOE points out, the degree of data processing skills needed to operate the DOE library is much less than that needed to reconfigure data processing systems. In fact, DOE asserts that "LSSI's successful reconfiguration of these rather antiquated systems enhanced, rather than detracted from, DOE's confidence in LSSI's technical capabilities." While we cannot conclude that LSSI's performance under its

maintenance services contract was wholly satisfactory, in view of the problems encountered, we also cannot conclude that the DOE evaluators should have downgraded LSSI's technical proposal in the areas relevant to data processing capability or regarded LSSI's proposal as weak in those areas. This being the case, we do not find fault with the technical evaluation results.

Material Misrepresentation in LSSI's Proposal

Informatics alleges that LSSI continued to include in its proposal the qualifications of a proposed key employee--a branch library supervisor--that LSSI knew was no longer committed to work for the firm if awarded the contract. In its initial offer, LSSI had proposed a certain individual for the position of branch library supervisor about whom DOE expressed reservation in part because the individual was not a United States citizen. Accordingly, LSSI substituted another individual (hereinafter "S") to fill that position.

The record shows that "S" was offered the position on April 23, contingent upon DOE's approval and LSSI's being awarded the contract. On April 24, "S" advised LSSI in writing that she accepted the offer with the contingency. On April 28, LSSI submitted its revised proposal including "S"'s qualifications for the position. It is undisputed that LSSI continued to propose "S" for the branch supervisor position up through the time of contract award. The other facts of the matter are in sharp dispute between the parties.

Informatics, pursuant to an affidavit from "S", asserts that "S" informed LSSI on April 25, prior to the submission of LSSI's revised proposal on April 28 that, immediately subsequent to accepting LSSI's offer, she had accepted another offer from a firm with which she had interviewed earlier because the offer was not contingent as was LSSI's offer. (The other firm in fact was Informatics.) "S" avers in her affidavit that she expressly informed LSSI at that time that she would not work for LSSI even if the firm were awarded the DOE library services contract.

LSSI, in accordance with the affidavits of its own personnel, claims that it did not learn from "S" that she had taken a position with another firm until after the submission of its second revised proposal on May 22, and, more to the point, that "S" never directly advised LSSI that she no longer would be open to consider LSSI's prior offer, but rather that she clearly conveyed a contrary impression.

We have held that an agency's evaluation of an offeror's key personnel, even though some are changed after award, is not objectionable when the offeror provided firm letters of commitment, and the names were submitted in good faith with the consent of the respective individuals (that is, the offeror was not proposing personnel it had no intention of providing). Development Alternatives, Inc., B-217010, Feb. 12, 1985, 85-1 CPD ¶ 188. Conversely, where it is established that an offeror made intentional misrepresentations that materially influenced the agency's consideration of its proposal, the proposal should be disqualified, Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53, or the contract canceled if the award has already been made. New England Telephone and Telegraph Co., 59 Comp. Gen. 746 (1980), 80-2 CPD ¶ 225.

In view of the LSSI affidavits, DOE has concluded that its further review of the facts surrounding Informatics' allegation is not necessary or appropriate. The agency believes that unless affirmative evidence of misrepresentation is offered by Informatics, we should reject the allegation that LSSI materially misrepresented "S"'s availability.

We agree with DOE. Although "S" has also stated by affidavit that she expressly informed LSSI that she was no longer available, the fact remains that "S" is presently an employee of the protester. Therefore, we have no basis to put more weight on "S"'s statement than on the LSSI employees' affidavits as being the accurate version of the facts. The most we can say is that when LSSI learned of "S"'s employment with another firm, it might have been prudent for LSSI to have withdrawn her qualifications statement and have substituted a key employee with a greater assurance of availability. We cannot conclude, however, that LSSI's failure to do so constituted an intentional misrepresentation.

Propriety of Probable Cost Evaluation

Informatics also questions the results of the agency's cost realism evaluation. The firm alleges that DOE should have recognized that LSSI's technical weaknesses would directly impact upon the probable cost of accepting the firm's offer. Informatics argues that LSSI, because of its lack of data processing capability, will be required to increase the number of man-hours dedicated to the work in order to perform successfully. Informatics also asserts that DOE improperly reduced the indirect cost rates originally proposed by LSSI as a result of its cost evaluation. Given the fact that LSSI

is a relatively new firm with little prior cost experience, Informatics urges that the cost realism analysis properly should have resulted in an upward adjustment in LSSI's rates, a defect compounded by the agency's unjustified reduction in those indirect rates.

When, as here, a cost-reimbursement contract is contemplated, the contracting agency must analyze each offeror's proposed costs in terms of their cost realism, since regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Advanced Technology Systems, Inc., 64 Comp. Gen. 344 (1985), 85-1 CPD ¶ 315. Hence, because the offerors' estimated costs of contract performance should not be controlling, the agency is required to conduct a cost realism evaluation before awarding a cost-type contract. FAR, 48 C.F.R. § 15.605(d) (1985); see also Norfolk Ship Systems, Inc., B-219404, Sept. 19, 1985, 85-2 CPD ¶ 309. However, since an evaluation of this nature necessarily involves the exercise of informed judgment as to what costs actually will be incurred by accepting a particular proposal, the agency clearly is in the best position to make this cost realism determination, and, in consequence, we will not disturb that determination unless it is shown to be unreasonable. Marine Design Technologies, Inc., B-221897, May 29, 1986, 86-1 CPD ¶ 502; Polaris, Inc., B-220066, Dec. 16, 1985, 85-2 CPD ¶ 669.


Under this standard, we have reviewed the results of DOE's cost realism evaluation, and we cannot conclude that the results reached were unreasonable. To the extent Informatics urges that LSSI's lack of data processing capability directly impacts upon the probable cost of accepting the firm's offer, it is well recognized that the impact of technical deficiencies upon the probable cost of performance is speculative and difficult to estimate. Therefore, perceived technical deficiencies do not necessarily represent quantifiable cost factors, but rather factors more germane to the technical evaluation findings and commensurate rating of the technical proposals. See SETAC, Inc., 62 Comp. Gen. 577, 589 (1983), 83-2 CPD ¶ 121 at 16. Since the agency did evaluate the proposals with regard to their relative technical merits, but found no weaknesses remaining at the conclusion of discussions to affect prospective contract performance, Informatics' argument on this point is essentially misdirected with regard to the propriety of the agency's probable cost evaluation.

Although Informatics also disputes DOE's analysis of the indirect cost rates proposed by the firms, our review of the cost evaluation documentation has revealed nothing to

indicate either that LSSI's rates were unreasonably adjusted downward or that Informatics' were unreasonably adjusted upward as a result of the cost realism analysis. See CACI, Inc.--Federal, 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. In sum, DOE determined that LSSI's indirect rates were too high because the firm had failed to consider the cost impact of the contract upon those rates as projected for the following fiscal years. However, in contrast, Informatics' proposed indirect rates were deemed to be understated since they in fact were significantly lower than the rates the firm had experienced recently as the incumbent.

We note that the agency's probable cost adjustments reflected the opinions and conclusions of the Defense Contract Audit Agency (DCAA) which was requested by DOE to furnish audit reports on the cost proposals. Although it is true, as Informatics points out, that DCAA audit reports are not binding upon the agency, see Booz, Allen & Hamilton, B-213665, Sept. 24, 1984, 84-2 CPD ¶ 329, at the same time it is also true that nothing precludes that agency, as here, from reasonably concurring with DCAA's findings for cost analysis purposes. See, e.g., Norfolk Ship Systems, Inc., B-219404, supra.

The protest is denied.

for 
Comptroller General
of the United States